UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ROBERTA KARNOFSKY, Plaintiff, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Defendant.	C.A. No.: 2:12-cv-00949-PMD **MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT**

SUMMARY OF ISSUES

The Plaintiff, Dr. Roberta Karnofsky, was a practicing Anesthesiologist who purchased a disability policy with an "Own Occupation Rider" from Connecticut Mutual Life Insurance Company now known as Massachusetts Mutual Life Insurance Company (Mass Mutual). Yearly premiums were paid since 1994 and in 2007 Dr. Karnofsky was injured in an automobile accident resulting in severe injuries to her neck and back. These injuries required her to gradually cut back on the time she spent in the operating room until she lost her job in 2010. In 2011 she filed for benefits for total disability.

The Policy provides for Total Disability if the insured "cannot perform the main duties of his/her occupation due to Sickness or Injury. The insured must be under a doctor's care." **Exhibit 1**, Policy Definitions page 2, MMPOL 00011.

The defendant does not dispute that Dr. Karnofsky's injuries have prevented her from performing anesthesia in the operating room.[1] (**Exhibit 2**, Deposition of Robert Miles, Mass

[1] Anesthesia in the operating room represents the main duties of her occupation as commonly understood and as outlined in the Dictionary of Occupational Titles (**Exhibit 3**).

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Mutual 30b6 page 56.) She is unable to stand for long periods, cannot bend her neck over a patient, or monitor devices with a patient's vital sign displays while overseeing the administration of drugs through intravenous needles or ports. She is unable to intubate a patient should an emergency arise during any procedure requiring additional surgical or anesthesia, such as an obstetrical patient who is receiving an epidural for routine child delivery but suddenly develops complications during the delivery and must undergo a cesarean section to the mother and/or baby. (**Exhibit 4** and **Exhibit 4.1**)

Despite this, Defendant has denied benefits for total disability insisting that the definition of Total Disability in the policy should be interpreted to require Dr. Karnofsky be unable to perform ALL the main duties of her occupation before she can be considered Totally Disabled under the policy. Defendant argues that since Dr. Karnofsky can still do "some" of the duties she performed before she became disabled, she is not Totally Disabled. Specifically, it reasons that since Dr. Karnofsky used to treat patients with pain management; and since Dr. Karnofsky can still treat patients with pain management; she cannot qualify for total disability as an anesthesiologist.

Defendant's analysis is misplaced for two reasons:

1. The policy does not require Dr. Karnofsky be unable to perform ALL the main duties of an anesthesiologist to be considered totally disabled.

2. The policy insures Dr. Karnofsky's own occupation as an anesthesiologist and pain management is NOT a main duty of an anesthesiologist.

This motion seeks partial summary judgment on these issues:

1. The Policy defines total disability is the inability to perform the "main duties" of an occupation-not "all" the main duties.

2. Dr. Karnofsky is unable to perform the main duties of an Anesthesiologist from 2010 to present.

Facts:

Dr. Roberta Karnofsky is a physician who has specialized and was Board certified in Anesthesiology[2] since 1993. (**Exhibit 8** Dr. Karnofsky's deposition pages 9 & 34) During that time she insured as an Anesthesiologist under an "own occupation" policy of disability insurance with the Defendant Mass Mutual Insurance. (**Exhibit 1** Policy Application) At all times relevant hereto Mass Mutual has considered her occupation to be that of an anesthesiologist[3].

In 2007, Dr. Karnofsky suffered significant injuries to her neck and back when she was involved in an automobile accident (**Exhibit 5**- medical record). The injuries received in the accident led to two back surgeries, one in July 2011 (**Exhibit 6** MM00212-213) and one in December 2011 (**Exhibit 7** MM00193).

At the time of her accident, Dr. Karnofsky worked approximately one day as week as an operating room anesthesiologist. Approximately 50% of Dr. Karnofsky's income derived from operating room anesthesia. (**Exhibit 8** Dr. Karnofsky's deposition at page 88). The balance of her income was derived from pain management procedures[4].

After her accident Dr. Karnofsky tried to return to work as an anesthesiologist in the operating room, but was unable to achieve her prior levels of production as an anesthesiologist. (**Exhibit 8** Dr. Karnofsky's deposition page 53) Her work as an anesthesiologist declined as her medical condition deteriorated. (**Exhibit 8** Dr. Karnofsky's deposition page 126) By 2009 and 2010 Dr. Karnofsky came to realize she would not be able to continue employment as an anesthesiologist and began to explore opening a practice consisting of pain management practice and cosmetic laser surgery. (**Exhibit** 8 Dr. Karnofsky's deposition pages 47, 126 & 151.) In May 2010 Dr. Karnofsky was terminated from her job with Anesthesia Associates. (**Exhibit 10** March 02, 2010 letter from Anesthesia Associates)

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[2] The Dictionary of Occupational Titles defines an anesthesiologist in relevant part as one who "Administers anesthetics to render patients insensible to pain during surgical, obstetrical, and other medical procedures".
[3] Steve Fresca, Mass Mutual's Vocational Consultant admits in his report that Dr. Karnofsky is an anesthesiologist, but does not discuss the duties of her occupation. (**Exhibit 9** MM1399-1401).
[4] She used to spend more time in the operating room, but in the years leading up to her accident, Dr. Karnofsky had cut back on her work in the operating room so that she could spend more time with her minor children. She supplemented her income by performing pain management procedures, from which she obtained about 50% of her income. (**Exhibit 8** Dr. Karnofsky's deposition, page 86 line 17)

The policy defines "Total Disability" as follows:

> "The insured is totally disabled if he/she cannot perform the main duties of his/her Occupation due to Sickness or Injury. The insured must be under a Doctor's Care" (**Exhibit 1** –Definitions, Page 2)

The policy contains an "own occupation" rider, which does not change the definition of total disability, but modifies the total disability benefits available. It provides that if the insured is totally disabled, she can recover her full benefits despite working at a new job as follows:

> "If the insured in working in a new occupation: A Total Disability may prevent the Insured from returning to his/her Occupation. However, an Income may be earned in a new occupation. If this should occur, We will pay the Total Disability Monthly Benefit shown in the Policy Specifications." (**Exhibit 1** – Own Occupation Rider, form M-91).

The policy also contains a provision providing benefits in the event of a partial disability. The policy defines "Partial Disability" as follows:

> "The insured is Partially Disabled if he/she:
> - Is suffering from a current Disability;
> - Is working at his/her occupation;
> - Has a loss of Income;
> - Is under a Doctor's Care; and
> - Can show a Demonstrated Relationship between the Loss of Income and the current Disability" (**Exhibit 1** – Definitions, Page 2)

In September 2011 Dr. Karnofsky submitted a claim for disability benefits. Dr. Karnofsky claimed Partial Disability from 4/10/2007 to 4/14/2010 and Total Disability after that date and going forward.[5] Mass Mutual paid benefits for Total Disability for a period of July 12, 2011 to June 09, 2012 (covering the time of her two surgeries and a recovery period) but refused to pay Total Disability benefits after that time.

Significantly, Mass Mutual acknowledges that Dr. Karnofsky stopped performing operating room anesthesia following the accident. (**Exhibit 2** Mass Mutual 30(b)(6) deposition at page 56). Despite this, Mass Mutual took the position that she did not qualify for Total Disability because she could still perform **some of the duties** of her occupation:

> Based on the currently known facts, MassMutual believes that Dr. Karnofsky can still perform (and is performing) the majority of the "main duties" she was engaged in (and from which she was earning income on) prior to her alleged Disability onset date. Therefore, during these time periods which she has this functional capacity, she does not satisfy the eligibility requirements of Total Disability. (**Exhibit 11** Mass Mutual letter of August 02, 2013.)

This suit resulted.

Standard of Review:

The moving party has the threshold burden of showing that there are no genuine issues of material fact. Rule 56(c), Fed.R.Civ.Proc., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden may be satisfed by pointing out to the District Court that there is an absence of evidence to support the opposing party's case. *Celotex Corp.*, 477 U.S. at 325. A judge is not to weigh the evidence, but to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Construction, Inc.*, 915 F.2d 121, 123-124 (4th Cir. 1990). "Where the record taken as a whole could not lead a rational trier of fact to find for

[5] By 2010 Dr. Karnofsky's income had dropped more than 75% of her pre-disability income. (**Exhibit 16**.) Alternatively, this would allow the recovery of Partial Disability Benefits under the policy for $5,625.00 per month. (**Exhibit 1**, Policy, page 3-4, MMPOL 00012-00013.)

the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

"Under South Carolina Law, the interpretation of an insurance contract is a matter of law for the court." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). "Insurance policies are subject to general rules of contract construction." *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983). "Parties to an insurance policy have a right to make their own contract, and courts should not "rewrite it or torture the meaning of a policy to extend coverage never intended by the parties." *Torrington Co. v. Aetna Cas. & Sur. Co.,* 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). Courts should "give policy language its plain, ordinary and popular meaning." *Gambrell*, 280 S.C. at 71, 310 S.E.2d at 816.

South Carolina courts do not rewrite contracts but construe the contracts as written. South Carolina law provides: "Courts must enforce not write contracts of insurance, and their language must be given its plain, ordinary, and popular meaning." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting with approval *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1997). This is particularly true for insurance contracts, which are construed to provide coverage. See, *M&M Corporation of South Carolina v. Auto Owners Ins. Co.*, 390 SC 255, 701 SE2d 33, 35 (2010).

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Evanston Ins. Co. v. Watts*, 52 F. Supp. 3d 761, 772 (D.S.C. 2014) "A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation." *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

South Carolina law mandates that a policy be read in favor of the insured in granting coverage. Ambiguous terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *Diamond State Ins. Co. v. Homestead Indus., Inc.,* 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

> It is a cardinal principle of insurance law in this State, requiring no citation of authority, that a policy or contract of insurance is to be considered liberally in favor of the insured, and strictly as against the company. Stated more fully, the rule is, that where by reason of ambiguity in the language employed in a contract of insurance, there is doubt or uncertainty as to its meaning, and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the company, the former will be adopted.
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> *Haselden v. Standard Mut. Life Ass'n*, 190 S.C. 1, 1 S.E.2d 924, 926 (1939); *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, 2001 WL 34907077 (D.S.C. 2001) [quoting exact proposition of law in *Haselden*, supra. with approval.]
>
> [W]here the language of an insurance contract may be understood in more senses than one, or where it is doubtful whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the insured.
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> *Haselden*, 190 S.C. at 7, 1 S.E.2d at 926, citing 6 Couch on Insurance, Sec. 1375, Page 4940; *Leonard v. Prudential Ins. Co.*, 128 Wis. 348, 107 N.W. 646, 116 Am. St. Rep., 50.

However, in cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962).

ARGUMENT:

A. The plain meaning.

Total Disability is defined in the policy as the inability to perform the main duties of her occupation and not "all" the main duties of her occupation. "Main duties" is not defined by the policy. This being the case, the phrase should be understood according to its ordinary meaning. *Garrett* supra.

Plaintiff maintains that the ordinary meaning of use of the term "main duties" is collective, meaning that an insured is considered totally disabled if she is unable to perform the collective main duties. Understood thusly, "main duties" is a noun used to describe a number of collective duties.

Consider the example of a carpenter. Say the "main duties" of a carpenter include 1. pounding nails, 2. sawing boards and 3. climbing ladders. A person who can pound nails and saw boards, but is unable to climb ladders cannot be said to be able to perform the "main duties" of a carpenter. Put another way, if an individual is unable to do one of several duties required of an occupation, she should be deemed totally disabled under this interpretation of the policy.

Mass Mutual on the other hand urges the court to adopt an expansive interpretation of the policy that would find "main" an adjective and "duties" a noun such that that it would require an individual to be unable to do ALL her main duties before she is considered totally disabled under the policy. It contends that if the insured can perform one of the main duties, then the insured is not disabled. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 48). This is NOT what the policy says and Mass Mutual acknowledges that fact.

> Q. The policy does not say that a customer must be unable to do all of the main duties of the occupation before they're considered totally disabled, does it?
> A. No, it does not use the word all.
> (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 witness page 42)

Courts have interpreted claims involving the same language as the present and have refused to construe a disability policy as the carrier demanded to mean "all" of the main duties of a profession. *Bybel v. Metropolitan Life Insurance Company,* 2010 US Dist. LEXIS 122367; 2010

WL 4665928 (E.D. PA 2010). In *Bybel*, a practicing obstetrician/gynecologist was unable to perform all manner of deliveries, including vacuum deliveries and cesarean sections and on-call work which were all main duties of her occupation. There, the carrier Metropolitan Life Insurance Company, urged the Court to find she was not totally disabled because she was able to perform many of her duties "with the exception of a few discreet and rarely performed tasks (vacuum deliveries and surgeries lasting over one hour), *Bybel* was fully capable of performing her main duties at all times material to this law suit." See, *Bybel* at 15. The Court refused to insert the term "all" main duties as was urged by the carrier in that case.

Similarly, this Court should order the plain meaning of the policy to mean the "main duties" of anesthesiology cannot be construed as requiring total disability to be "all" the main duties[6].

B. Ambiguity

The policy does not tell us whether Mass Mutual intended "main duties" to be a collective noun as Dr. Karnofsky believes or an adjective describing a noun, as Mass Mutual insists. It could be possibly interpreted either way. This being the case, the rules of construction require that it be interpreted in a way most favorable to the insured. (see *Diamond State Ins. Co.* supra. and *Haselden v. Standard Mut. Life Ass'n., 1 S.E.2d at 926)*)

In this regard, Mass Mutual concedes the policy does not specify how many of the main duties an insured must be unable to perform to qualify for total disability. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 42) It agrees that the policy does not say whether the

[6] It is interesting to note, that regardless of how one characterizes "main duties", Mass Mutual cannot escape the fact that Dr. Karnofsky is not performing the same main duties she was before her wreck. This was admitted by Mass Mutual's expert Barbara Muller:

> Q. The question was, is she doing -- is she performing the same main duties today as she was at the time of the wreck?
> A. No. (**Exhibit 12** Deposition of Barbara Muller at page 63)

insured must be unable to perform all, some or one of the main duties to be considered totally disabled. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 42-43). And it agrees that it would be more favorable to Dr. Karnofsky if the policy were interpreted so that she need only be unable to perform one of the main duties to be considered totally disabled. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 45) This being the case, the policy must be construed in a manner most favorable to Dr. Karnofsky. (see *Diamond State Ins. Co.* supra.)

C. The regulations:

The policy could have been written to define Total Disability as the inability to perform all the material duties of one's occupation, but was not. The regulations promulgated by the Insurance Commission pursuant to the South Carolina Code of Laws delimitate the provisions an insurance company may include in a policy of disability insurance. SC ADC 69-34 (9) details the language, conditions and definitions allowable in a disability policy. § (9) (c) of the regulations provides authorization for an insurer to define total disability as Defendant proposes in the present case:

> (c) An insurer may specify the requirement of the complete inability of the person to perform all of the substantial and material duties of his regular occupation or words of similar import. An insurer may require care by a physician (other than the insured or a member of the insured's immediate family). (parenthesis original, emphasis added)

The regulation permits defendant to specify that the definition of total disability is the inability to perform *all* of the material duties of one's occupation. The Defendant did not use such language in this case. The present policy does not employ the language that would require a showing of the inability to perform *all* the material duties of ones occupation as a condition of total disability.

Despite this, the Defendant shamelessly insists that the policy should be construed "as if" it had employed the language. Barbara Muller is the expert offered by Mass Mutual to justify its interpretation of the policy. Ms. Muller insisted that despite the differences in the definitions, the policies should be understood to mean the same thing:

> Q. Good. Now, that language is not contained in Dr. Karnofsky's policy, is it?
> A. No, it's different language.
> Q. But you're using the interpretation from this definition of partial disability in Dr. Karnofsky's policy, aren't you?
> A. Well, I think that regardless of the choice of words they mean the same thing in either policy.
>
> (**Exhibit 12** Deposition Barbara Muller page 43)

The simple fact of the matter is that Mass Mutual could have employed language that defined Total Disability as the inability to perform all the material duties of an occupation, but did not. Mass Mutual's insistence that it means the same thing is nothing more than an attempt to rewrite the policy.

D. Comparison with other policies.

The meaning of any one term in a policy will necessarily be informed by what surrounds it; in fact, a court must not interpret any provision of a contract without reference to the entire document. *Williams v. Gov't Emples. Ins. Co.,* 409 S.C. 586, 596-97, 762 S.E.2d 705, 711 (2014) ("For the general purposes of construction, an application will be considered a part of the contract, if it is referred to in the policy in such a way as to indicate a clear intent to make it a part thereof." (citation omitted)) *with Ferguson v. Allied Mut. Ins. Co*., 512 N.W.2d 296, 299 (Iowa 1994) ("When construing insurance policies we consider the effect of the policy as a whole, in light of all declarations, riders, or endorsements attached."). See also *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.,* 478 F.2d 556, 560 (3d Cir. 1973) ("A contract is to be considered as a whole, and, if possible, all its provisions should be given effect[.]"). Moreover, "a contract should be construed so as to give effect to its general purpose." Id. *Bybel v. Metro.*

Life Ins. Co., 2010 U.S. Dist. LEXIS 122367, *14-15, 2010 WL 4665928 (E.D. Pa. Nov. 18, 2010).

The definition of Total Disability can be understood by reading it together with the definition of Partial Disability, and comparing it to other policies sold by Mass Mutual.

Consider for example that Defendant argues an insured is Partially Disabled if she can perform "some, but not all" of the main duties of her occupation. (**Exhibit 11** Mass Mutual letter of August 02, 2013.) Defendant reasons if Partial Disability is defined as the ability to perform "some but not all" of the main duties, it should follow that Total Disability requires the inability to perform more than some of the main duties of one's occupation. This argument might make sense if indeed the definition of partial disability is as Defendant claims.

The problem is that Defendant has brazenly misstated the definition of partial disability contained in Dr. Karnofsky's policy in order to justify its interpretation of Total Disability. Defendant has lifted a definition of partial disability that is contained in a different policy and tried to craft it onto Dr. Karnofsky's policy.

Defendant acknowledges that the ability to perform "some but not all" of the mains duties is not part of the definition of Partial Disability. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 50).

Partial disability is defined in Dr. Karnofsky's policy as follows:

> The insured is partially disabled when he/she:
> - is suffering from a current Disability;
> - is working at his/her Occupation;
> - has a Loss of Income;
> - is under a Doctor's care; and
> - can show a Demonstrated Relationship between the Loss of Income and the current Disability.

Defendant does sell a policy that defines partial disability in terms of duties, and it contains language far different from that of Dr. Karnofsky's policy. The language in the other policy defines partial disability as follows:

> **Partial Disability:** You're partially disabled if because of sickness or injury:
>
> - you can do *some, but not all* of the main duties of your occupation (emphasis added)
>
> (**Exhibit 15** Connecticut Mutual Policy)

If partial disability were defined in Plaintiff's policy as the ability to "do some, but not all of the main duties of your occupation", it would make sense to argue that Total Disability requires the inability to perform more that "some" of the main duties. But it does not.

The fact that Defendant has attempted to justify its interpretation of Total Disability in Dr. Karnofsky's policy by employing a definition of partial disability from a different policy shows that its interpretation is not applicable to the present policy. Defendant is asking the court to rewrite the present policy to include the language of another policy. This is clearly impermissible. Defendant is urging the court to adopt a definition of partial disability contained in a different policy to explain the meaning of total disability in the present policy as the Defendant's expert shamelessly acknowledges as much:

> Q. Good.· Now, that language is not contained in Dr. Karnofsky's policy, is it?
> A. No, it's different language.
> Q. But you're using the interpretation from this definition of partial disability in Dr. Karnofsky's policy, aren't you?
> A. Well, I think that regardless of the choice of words they mean the same thing in either policy.
>
> (**Exhibit 12** deposition of Barbara Muller page 43)

Undeterred by logic, Defendant's 30b6 witness has offered a bewildering explanation of why the definition of Partial Disability should be read to include the "some but not all of the main duties" language contained in the other policy even though it was not contained in Dr. Karnofsky's policy.

First, he claimed that Dr. Karnofsky's policy references the definition of "DISABILITY DISABILITIES or DISABLED" which the witness *claimed*, turned on the inability to perform "occupational duties":

> "by reference, it speaks to the definition of disability which speaks to the lessening of the insured's ability to perform their *occupational duties*." Emphasis added
>
> (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 53).

When confronted with the fact that the definition of "DISABILITY DISABILITIES or DISABLED" did not turn on the lessening of the insured's ability to perform her *occupational duties*, he astonishingly denied ever having said that:

> Q. Okay. Would you look at the policy which is Exhibit Number 7 there?
> A. I do have it.
> Q. Is that contained on page 1 of the definitions?
> A. Yes, it is.
> Q. You just told us that that disability, disabilities, or disabled described the occupational duties?
> A. No, that's not what I said.
>
> (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 54)

Then he conceded that the definition of "DISABILITY DISABILITIES or DISABLED" referred to the reduced capacity to perform his or her "occupation" and not duties. (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 54). Which then took his reasoning back to the definitions of Total and Partial Disability. (Exhibit 2 Deposition of Robert Miles, Mass Mutual 30b6 page 55).

Finally, after reviewing all the definitions the witness admitted that the definition of "DISABILITY DISABILITIES or DISABLED" did not change either the definition of Partial or Total Disability:

> Q. This doesn't change those definitions at all, does it?
> A. No, it doesn't.
>
> (**Exhibit 2** Deposition of Robert Miles, Mass Mutual 30b6 page 55)

Mass Mutual's tortured and circular reasoning is nothing more than Mass Mutual's attempt to rewrite the policy to comply with its own private view of what it should mean. This sort of fatuous and transparent manipulation of the language of the policy is unacceptable. The policy is governed by the outward expression of the language, not by the undisclosed intent of the insurance company. As here, this Court rejected an insurers "secret intention" in interpreting its policy and incorporating its restrictive view of the policy through "standard practices" of its claims representatives which is revealed only after any insured makes a claim. The restrictive view of disability and urged by Mass Mutual is not what the policy says nor is it permissible under the long standing South Carolina insurance law on interpreting policies. See, *Wright v. UNUM Life Ins. Co.*, supra., 2001 U.S. Dist. LEXIS 26063, p. 18, 2001 WL 34907077, p. 6.

E. Pain Management is not a "main duty" of anesthesia

Even assuming that Defendant's interpretation (that the ability to perform one of the main duties of her occupation precludes a finding of Total Disability) is correct, Dr. Karnofsky is still entitled to benefits for Total Disability because she is unable to perform the duties of an anesthesiologist as they are universally understood.

Defendant's argument that Dr. Karnofsky is not totally disabled because she can perform pain management is misplaced because there is no evidence that pain management is or was ever a main duty of anesthesia. Defendant's entire argument turns on a mistaken factual assertion that pain management is a main duty of anesthesia. It is mistaken because there is no factual basis for that assertion. Defendant never did an evaluation of the main duties of an anesthesiologist. Mary Fuller is a former supervisor of claims for Unum, one of the largest disability insurers in the nation and Plaintiff's expert. She pointed out that Mass Mutual's consultants recommended getting a vocational analysis of the duties of an anesthesiologist, but the claims handler failed to do so.

> "They had recommendations from there (sic) physician to get IMEs and to do a vocational analysis of her prior --Dr. Karnofsky's prior occupation as an anesthesiologist and her new occupation as an anesthetist, didn't do that, no explanation for that." (**Exhibit 13** deposition of Mary Fuller page 23)

Mass Mutual concluded pain management was a main duty of anesthesiology because Dr. Karnofsky's billing codes showed that she earned much of her income from the practice of pain management. (**Exhibit 14** deposition of Jessica Mytykiuk page 57) The problem with this is none of the authorities list pain management as a main duty of an anesthesiologist (see **Exhibit 3** Dictionary of Occupational Titles). Mass Mutual erroneously jumped to the conclusion that pain management was a main duty of an anesthesiologist.

Dr. Karnofsky was insured under an Own Occupation policy, purchased through the South Carolina Medical Association as an anesthesiologist. She happened also to do pain management. This does not make pain management a "main duty" of anesthesiology. Mass Mutual insured Dr. Karnofsky's occupation as an anesthesiologist. A finding of Total Disability turns on a finding she is unable to perform the Main Duties of her occupation. The fact that she might have performed duties other than that of an anesthesiologist does not make them main duties of an anesthesiologist. The fact that she might still be able to perform pain management does not, in and of itself mean she does not qualify for total disability as an anesthesiologist.

F. Plaintiff's efforts to find new employment

Plaintiff's policy contains an Own Occupation Rider which specifically states "income earned from a new occupation will not affect the Total Disability Benefits provided under this Rider". (**Exhibit 1** –Own Occupation Rider, form M-91). This added benefit prevents Mass Mutual from using income from another occupation as a means to deny the benefits provided under its Own Occupation disability policy. The Rider further states:

> However, an Income may be earned in a new occupation. If this should occur, We will pay the Total Disability Monthly Benefit shown in the Policy.

Mass Mutual takes the position that Dr. Karnofsky's losses in her attempt to make a living at a new venture, somehow shows that she is not totally disabled. Mass Mutual does this by inaccurately reading the policy and also inferring that her losses show the "ability" to earn an income as an anesthesiologist. It ignores its Own Occupation Rider, which states that income earned from a new occupation will not affect the Total Disability Benefits.

Nowhere does Mass Mutual put forth what Dr. Karnofsky's income may be. Mass Mutual merely says that it must be something, and this is in Mass Mutual's world renders her only partially disabled under its policy. The analysis should stop with the inability to perform her occupation as an anesthesiologist as established by her treating physicians and vocational expert. She should have the benefit from 2010 to present at the very least since that there is nothing in the record to show Dr. Karnofsky can perform the main duties as an anesthesiologist. Mass Mutual has not obtained an Independent Medical Exam (IME) or other vocational expert to state otherwise.

Instead, Mass Mutual claims Dr. Karnofsky is only partially disabled by reviewing her efforts to start a new venture. This is not permissible under the Own Occupation Rider or the facts. Dr. Karnofsky cannot perform as an anesthesiologist as her treating physicians have repeatedly maintained. Her vocational expert agrees. There is no evidence to support that she can perform the main duties of an anesthesiologist.

CONCLUSION

The disability policy with the Own Occupation Rider must be construed as written as requiring the inability to perform the main duties of Dr. Karnofsky's occupation as an anesthesiologist. It does not require her to show the inability to perform "all" the main duties of an anesthesiologist.

Dr. Karnofsky has shown the entitlement to Total Disability since she is unable to perform the main duties of an anesthesiologist. Medical and vocational evidence and expert opinions show that Dr. Karnofsky cannot do the main duties of an anesthesiologist. She is entitled to benefits from June 08, 2012 to the present.

Alternatively, Dr. Karnofsky is entitled to Partial Disability benefits at the rate of $5,625.00 per month, the same as the rate for Total Disability, since the Defendant had failed to show she is earning an income from her occupation as an anesthesiologist at more than 25% of her Pre-disability income. (75% loss of income qualifies for full benefits under the policy. **Exhibit 1**, Policy, page 3 - 4, MMPOL00012 - 00013) (See, **Exhibit 17** Summary of Benefits Paid and Not Paid.) Mass Mutual's investigation on July 23, 2013 revealed a " … greater than 75% LOI [Loss of Income]." (**Exhibit 16** MM 01865.)

This same reasoning applies to Mass Mutual's concession of partial disability in June, 2010 through July, 2011, the time of her first neck surgery. Here Mass Mutual paid only the minimum of 50% of the partial disability benefit of $5,625.00 or $2,812.50 per month after applying her three (3) month waiting period. This calculates to an additional payment of $28,312.50 for the full monthly amount that was due under a total disability analysis or under a partial disability analysis viewing her drastic loss of income.

This is an additional ground for granting Summary Judgment on her right to collect the same benefit of $5,625.00 per month from July, 2012 to present. Here again Mass Mutual has paid nothing to the insured even though its official concedes she was partially disabled and the records substantiate that she received no income in excess of 25% of her previous ability income (**Exhibit 16**) which should entitle her to full partial benefits of $5,625.00 per month under a partial disability analysis and/or under the total disability analysis for this same benefit amount of $5,625.00.

Although Mass Mutual claims it was trying to determine her potential disability benefit, it did not provide any evidence of an imputed income which would diminish her right to receive $5,625.00 per month in benefits. This Court can order that Mass Mutual pay the full benefit now under a Total and alternatively, Partial Disability analysis.

Pursuant to S.C. Code Ann. § 38-59-40, the Plaintiff is entitled to an award of attorneys' fees and costs for the failure to pay these benefits and therefore this court can require submission by Plaintiff's counsel to substantiate a reasonable fee for any benefits awarded by this partial summary judgment. Finally, this would have the issue of disability for 2007 to June, 2010, future benefits, and the issue of bad faith for trial.

[SIGNATURE ON FOLLOWING PAGE]

RESPECTFULLY SUBMITTED,

Dated: July 6, 2015

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